



[Billing Code 4710-25]

DEPARTMENT OF STATE

22 CFR Parts 120, 121, and 124

RINs 1400-AC80 and 1400-AD33

[Public Notice: 8329]

Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV and Definition of “Defense Service.”

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: As part of the President’s Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise Category XV (Spacecraft Systems and Related Articles) of the U.S. Munitions List (USML) to describe more precisely the articles warranting control on the USML. The definition of “defense service” is to be revised to, among other changes, specifically include the furnishing of assistance for certain spacecraft related activities. The revisions contained in this rule are part of the Department of State’s retrospective plan under E.O. 13563 completed on August 17, 2011.

DATES: The Department of State will accept comments on this proposed rule until [insert date 45 days from date of publication in the *Federal Register*].

ADDRESSES:

Interested parties may submit comments within 45 days of the date of publication by one of the following methods:

- E-mail: *DDTCResponseTeam@state.gov* with the subject line, “ITAR Amendment – USML Category XV and Defense Services.”
- Internet: At *www.regulations.gov*, search for this notice by using this rule’s RIN (1400-AD33).

Comments received after that date will be considered if feasible, but consideration cannot be assured. Those submitting comments should not include any personally identifying information they do not desire to be made public or information for which a claim of confidentiality is asserted because those comments and/or transmittal e-mails will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls website at *www.pmdtcc.state.gov*. Parties who wish to comment anonymously may do so by submitting their comments via *www.regulations.gov*, leaving the fields that would identify the commenter blank and including no identifying information in the

comment itself. Comments submitted via *www.regulations.gov* are immediately available for public inspection.

FOR FURTHER INFORMATION CONTACT: Ms. Candace M. J. Goforth, Director, Office of Defense Trade Controls Policy, U.S. Department of State, telephone (202) 663-2792, or e-mail *DDTCResponseTeam@state.gov*. ATTN: Regulatory Change, USML Category XV and Defense Services. The Department of State's full retrospective plan can be accessed at <http://www.state.gov/documents/organization/181028.pdf>.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120-130). The items subject to the jurisdiction of the ITAR, *i.e.*, “defense articles” and “defense services,” are identified on the ITAR’s U.S. Munitions List (USML) (22 CFR 121.1). With few exceptions, items not subject to the export control jurisdiction of the ITAR are subject to the jurisdiction of the Export Administration Regulations (“EAR,” 15 CFR parts 730-774, which includes the Commerce Control List (CCL) in Supplement No. 1 to part 774), administered by the Bureau of Industry and Security (BIS), U.S. Department of Commerce. Both the ITAR and the EAR impose license

requirements on exports and reexports. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other set of regulations are subject to the EAR.

All references to the USML in this rule are to the list of defense articles controlled for the purpose of export or temporary import pursuant to the ITAR, and not to the defense articles on the USML that are controlled by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for the purpose of permanent import under its regulations. *See* 27 CFR part 447. Pursuant to section 38(a)(1) of the Arms Export Control Act (AECA), all defense articles controlled for export or import are part of the USML under the AECA. For the sake of clarity, the list of defense articles controlled by ATF for the purpose of permanent import is the U.S. Munitions Import List (USMIL). The transfer of defense articles from the ITAR's USML to the EAR's CCL for the purpose of export control does not affect the list of defense articles controlled on the USMIL under the AECA for the purpose of permanent import.

Revision of Category XV

Public Law 105-261, the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, required that space-related items,

including all satellites, were to be controlled as defense articles and removed the President's authority to change their jurisdictional status.

Section 1248 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84) provided that the Secretaries of Defense and State carry out an assessment of the risks associated with removing satellites and related components from the USML. The Departments of Defense and State conducted this review and identified certain satellites and related items that do not contain technologies unique to the United States, are not critical to national security, and are more appropriately controlled by the EAR, which allows for the creation of license exceptions for exports to certain destinations and complete controls for exports to others. This report was provided to the Congress in April 2012.

The National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239), in section 1261, effectively returned to the President the authority to determine which regulations govern the export of satellites and related articles. With this authority, and pursuant to the President's Export Control Reform effort, the Department proposes the following revisions to USML Category XV.

Paragraphs (a) and (e) are to be revised to more specifically describe the articles controlled therein.

Paragraph (b) is to be revised to limit its scope to ground control systems and training simulators specially designed for telemetry, tracking, and control of spacecraft in paragraph (a).

The articles currently covered in paragraph (c), certain Global Positioning System receiving equipment, are proposed to be controlled on the USML under Category XII. Until a revised USML Category XII is implemented, these articles will continue to be covered in USML Category XV(c).

The articles currently covered in paragraph (d), certain radiation-hardened microelectronic circuits, are to be controlled on the CCL in new ECCN 9A515.d.

Additionally, articles common to the Missile Technology Control Regime Annex and the USML are to be identified on the USML, including in USML Category XV, with the parenthetical “(MT)” at the end of each section containing such articles.

A new “(x) paragraph” has been added to USML Category XV, allowing ITAR licensing for commodities, software, and technical data subject to the EAR provided those commodities, software, and technical data are to be used in or with defense articles controlled in USML Category XV

and are described in the purchase documentation submitted with the application.

Although the proposed revisions to the USML do not preclude the possibility that satellites and related items in normal commercial use would or should be ITAR-controlled because, *e.g.*, they provide the United States with a critical military or intelligence advantage, the U.S. Government does not want to inadvertently control items on the ITAR that are in normal commercial use. The public is thus asked to provide specific examples of satellites and related items, if any, that would be controlled by the revised USML Category XV that are now in normal commercial use.

Definition for Defense Services

A proposed revision of the definition of defense service, pursuant to ECR, was first published on April 13, 2011, as RIN 1400-AC80 (*see* “International Traffic in Arms Regulations: Defense Services,” 76 FR 20590). In that rule, the Department explained it was determined that the definition is overly broad, capturing certain forms of assistance or services that do not warrant ITAR control.

Rather than proceed to a final rule on the definition, the Department is republishing the definition as a proposed rule, incorporating certain changes

stemming from the public comment review, but also including in the definition the provision of certain assistance with regard to spacecraft.

For the first revision, thirty-nine parties submitted comments within the established comment period recommending changes to the revised definition. The Department reviewed and considered these comments and, when the recommended changes added to the clarity of the regulation and were congruent with ECR objectives, the Department accepted them. The Department's evaluation of certain of the written comments and recommendations follows, grouped by general subject matter.

Comments on Terms and Definitions in Defense Services

Two commenting parties recommended clarification that "integration" as used in ITAR §120.9(a)(2) does not mean activities to ensure compatibility, secure, load, or install cargo that is subject to the EAR for stowage in spacecraft or other aircraft, vessels, or vehicles which are themselves subject to the ITAR. The Department confirms that the meaning of "integration" does not encompass the meaning of "stowage."

Three commenting parties recommended replacing the term "incorporation" in ITAR §120.9(b)(3) with either "installation" or "integration," to avoid confusion. The Department accepted this recommendation and has replaced "incorporated" with "integrated."

Two commenting parties recommended “mere plug-and-play installation activities” should not be considered a defense service and thus described in ITAR §120.9(b). The Department agrees that such services are not within the definition of a defense service. However, given that ITAR §120.9(a)(2) is limited to integration services a separate exclusion paragraph is unnecessary. To clarify the distinction between services comprised of “installation” and those of “integration,” the Department is providing within the regulation the definitions of those terms that were provided in the first proposed rule’s supplementary information section.

Three commenting parties recommended replacing the phrase “employment of defense articles” with “use of defense articles” in ITAR §120.9(a)(3) and ITAR §124.1(a) for clarity. Similarly, another commenting party recommended replacing the word “employment” with the word “use,” as the term is defined in the EAR. And, another commenting party recommended modifying the term “employment” with the terms “tactical or combat.” The Department has revised this section adding the term “tactical,” to differentiate training in such employment from the type that is not to be within the definition of a defense service (training in basic operation).

One commenting party recommended that reference to “foreign units and forces” in ITAR §120.9(a)(3) be revised to “foreign military units and forces” for consistency with ITAR §124.1(a). The Department has reviewed the terminology in this section, but rather than accept the recommendation, “foreign person” will replace “foreign units and forces” in ITAR §120.9(a)(3), and is removed from ITAR §124.1(a) entirely.

One commenting party requested clarification of whether companies not involved in the manufacture of defense articles would nonetheless be required to register with DDTC if their items are integrated into USML controlled items pursuant to ITAR §120.9(a)(2). Mere integration of an item into a defense article does not render it a defense article, and thereby necessitating registration of the manufacturer of the item. The manufacturer may determine its classification by consulting the USML for its enumeration, applying the specially designed definition, or by submitting a commodity jurisdiction request to the Department for its official determination.

One commenting party requested clarification of whether companies will be required to amend approved agreements for activities that may no longer be considered defense services. While companies will not be required to submit amendment requests in these instances, the Department

recommends these companies contact the Department of State or Commerce for any necessary clarification of their circumstances and which authorizations are required.

Comments on the Use of Public Domain Information in a Defense Service

Five commenting parties recommended ITAR §120.9(a)(4) be revised to clarify that an aggregation of public domain data is still public domain data, and two commenting parties requested clarification that the aggregation of public domain data cannot be considered a defense service or render the data “other than public domain.” The Department confirms that a defense service involves technical data and therefore the use of publicly available information would not constitute a defense service according to the new ITAR §120.9(b)(2). The Department notes, however, that it is seldom the case that a party can aggregate public domain data for purposes of application to a defense article without using proprietary information or creating a data set that itself is not in the public domain.

Ten commenting parties recommended replacing the phrase “other than public domain” in ITAR §120.9(a)(1) with “using technical data (see §120.10),” as the former phrase would extend the definition of “defense service” to include services the Department did not intend to capture, including assistance provided using proprietary data not controlled by the

ITAR. The Department did not accept this comment because it intends to control as a defense service certain services that use other than technical data. An example would be the services covered under ITAR §120.9(a)(3).

Two commenting parties recommended exclusion of “fundamental research” from ITAR controls, similar to the EAR treatment of this term found in 15 CFR §734.8. These parties suggested that this measure would ensure science and academic research are not unnecessarily hampered. The Department notes that “fundamental research,” as it is defined in ITAR §120.11, is not controlled by the ITAR.

One commenting party noted that the supplementary information section of the proposed rule indicated that using data that is “other than public domain data” (including proprietary data or “technology” “subject to the Export Administration Regulations”) to provide assistance would constitute a defense service, but this is not reflected in the actual regulation. This matter will be addressed more fully in the forthcoming rules regarding the revision of the definitions for technical data and public domain information.

One commenting party stated that the Department’s intention of narrowing the focus of defense services to the furnishing of assistance using “other than public domain data” is frustrated by the exclusion of the phrase

“other than public domain data” from paragraphs (a)(2)-(a)(4) of the definition. Similarly, another commenting party requested clarification from the Department on whether the exclusion was an oversight. The Department confirms excluding the phrase from those paragraphs was intentional, and disagrees with the first commenting party for the following reasons. In paragraph (a)(2), the service of integrating an item into a defense article is covered, which necessarily involves the use of technical data (meaning, the Department believes that the service of “integration” cannot be effected only with public domain information). Paragraph (a)(3) may control services that use other than technical data. And the phrase “other than public domain data” is not relevant to the service described and controlled in paragraph (a)(4).

One commenting party recommended that proprietary data furnished by a foreign person not be covered by the phrase “other than public domain data.” And two commenting parties recommended the controls in ITAR §120.9 be based on the use of “U.S. origin” technical data. The Department intends to regulate the identified services regardless of the origin of the data used in the provision of the service.

Comments on Proposed Exclusions Paragraph

Two commenting parties recommended that the exclusion in ITAR §120.9(b)(1) be extended to include intermediate-level maintenance for greater interoperability. The Department did not accept this recommendation. The Department wants to continue controlling this level of maintenance.

Twelve commenting parties suggested that use of the phrase “U.S. citizen” in ITAR §120.9(b)(2) raises questions regarding the employment of lawful permanent residents, or unnecessarily rules out other categories of U.S. person employees (*e.g.*, lawful permanent residents as defined by 8 U.S.C 1101(a)(20) and protected individuals defined by 8 U.S.C. 1324b(a)(3)) from the exclusion, and that this phrase should be replaced with “U.S. person” as defined by ITAR §120.15, “an individual who is a U.S. person,” or “U.S. person (natural person).” The Department accepted this comment in part by revising the phrase to read “natural U.S. person.”

One commenting party stated that use of the phrase “mere employment” in ITAR §120.9(b)(2) is too narrow and would not exclude U.S. persons from performing the duties of their employment, and recommended that this part be revised to explicitly exclude these activities as well. Stating that this section is ambiguous, two commenting parties recommended it be revised to more explicitly state which employment

activities are excluded by this section. This part of the regulation is meant to provide that the act of employing a natural U.S. person does not automatically mean that a foreign person will be receiving a defense service. The Department believes the phrasing conveys this meaning.

One commenting party requested that, because ITAR §120.9(b)(2) covers cases where a foreign person employing a U.S. person may constitute the provision of a defense service, the Department clarify whether an individual may register as a manufacturer or exporter of defense articles and defense services, since that individual would first have to be registered with the Department before he can seek a license. Another commenting party recommended that individual U.S. employees working abroad should be permitted to use U.S. origin technical data exported to their parent foreign company without a license. A third commenting party recommended that ITAR §120.9(b)(2) be revised to stipulate that the definition of a defense service not include the instance where a U.S. person uses foreign-source technical data that would be ITAR-controlled had it been acquired by the U.S. person in the United States. The issue of whether an individual U.S. person may be required to register with the Department will be addressed in future guidance.

Two commenting parties recommended stipulating that all law enforcement, physical security, or personal protective services not be included within the definition of a defense service, and not only that which uses public domain data. The use of technical data is a controlled activity, regardless of the type of service provided. Therefore, the Department did not accept this recommendation.

One commenting party recommended exclusion from the definition of defense service the integration of items controlled on the CCL into items on the USML using solely public domain data. Given the nature of the integration process, the Department does not agree that this type of service should be excluded.

One commenting party recommended clarification that the provision of defense services exclusively to the U.S. Government outside the United States is not a defense service. The Department agrees activities between two U.S. persons do not constitute a defense service.

One commenting party recommended that ITAR §120.9(b)(3), which excludes from the definition of a defense service the servicing of an item subject to the EAR that has been integrated or installed into a defense article, be clarified to include “installation” and “removal” of CCL items during those activities. Similarly, one commenting party recommended adding

“troubleshooting,” “inspection,” and “other routine services for” to that paragraph, as examples of services not considered defense services. The Department has rephrased the paragraph to cover the “servicing of an item subject to the EAR,” which includes the activities described by these commenting parties.

One commenting party recommended the example of what is not a defense service identified in §120.9(b)(1) be expanded to include actual performance of basic maintenance on a defense article on behalf of a foreign person. Similarly, another commenting party requested clarification on whether actual performance is included. The Department notes that for certain countries, there are licensing exemptions for the performance of basic maintenance (*see* ITAR §124.2). This is the extent to which the Department wants to exempt from the licensing requirement actual performance of basic maintenance on a defense article on behalf of a foreign person.

One commenting party recommended that because “organizational-level maintenance” is not cited in ITAR §120.9(a)(1), it should be explicitly included as an exclusion in ITAR §120.9(b). Training in organizational-level maintenance is specifically excluded as a defense service in paragraph (b)(1).

Five commenting parties recommended clarification of whether ITAR §120.9(b) provides an exhaustive list of what does not constitute a defense service, and if not, that the regulatory text specify that the examples provided in paragraph (b) are not exhaustive. The examples in ITAR §120.9(b) are not an exhaustive listing of services that are not within the definition of a defense service. Rather, the paragraph is meant to highlight those services about which the Department has received, or anticipates receiving, inquiries regarding their classification.

Paragraph (a)(2) and Miscellaneous Comments

Two commenting parties noted that ITAR §120.9(a)(2) includes within the definition of a defense service the integration into a defense article of items controlled on the USML or on the CCL, but not items that are subject to the EAR but classified as EAR99. The commenting party recommended this exclusion be specifically stated to avoid confusion. Similarly, two commenting parties recommended clarification to explicitly exclude integration of items designated as EAR99. The Department has replaced reference to items controlled on the CCL with items subject to the EAR. The focus of this paragraph is on the service of “integration” into a USML article, which of necessity requires use of technical data.

One commenting party requested clarification of whether integration of a foreign item into a defense article would constitute a defense service. The Department confirms that the origin of an item is not relevant in determining whether a defense service is being provided.

One commenting party recommended that the definition of defense service address instances where USML articles are incorporated or installed into a CCL item, similar to how ITAR §120.9(b)(3) addresses CCL items integrated or installed into USML items. This circumstance will be addressed in a separate rule.

One commenting party stated that activities beyond the jurisdiction of U.S. law are captured by the new defense services definition. The commenting party provides as an example of such activity the case where a foreign person located outside the United States furnishes assistance to another foreign person for the integration of a foreign item into another foreign item. By definition, defense services are only provided by U.S. person to a foreign person. ITAR §120.9 does not capture the circumstance described by the commenting party.

One commenting party recommended ITAR §120.9(a)(2) should focus on the nature of the integration activity and not on the part being integrated and suggested the proposed phrasing would allow a U.S. person to

integrate a foreign origin article without providing a “defense service,” because these parts are not under U.S. jurisdiction. For the purposes of clarity, ITAR §120.9(a)(2) does identify the classification of articles (USML and CCL) that are included for the purposes of control in this defense service. Nevertheless, the focus of this provision is the service of “integration” into a defense article. And as noted in the paragraph, the service of integration into an ITAR controlled defense article is a defense service regardless of the origin of the articles.

Additional Changes

The Department proposes that ITAR §124.1(a), which describes the approval requirements of manufacturing license agreements and technical assistance agreements, be revised to remove the requirement of Department approval for the provision of a defense service using public domain data or data otherwise exempt from ITAR licensing requirements. The Department also proposes that it be revised to remove a redundant provision regarding the necessity to obtain approval for the training of foreign military forces, an activity covered in ITAR §120.9(a)(3).

The Department proposes to remove ITAR §124.2(a). The activity described therein – the provision of training in the basic operation of a defense article – will not be controlled as a defense service, therefore

obviating the need for this exemption. ITAR §124.2(b) will be removed for similar reasons: the activity described therein is not controlled as a defense service, nullifying the reason for this exemption. ITAR §124.2(c) will be revised to reflect the proposed deletion of §124.2(a). These changes conform to the proposed revision of the defense service definition.

REGULATORY ANALYSIS AND NOTICES

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA). Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 45-day provision for public comment and without prejudice to its determination that controlling the import and export of defense services is a foreign affairs function. As noted above, and also without prejudice to the Department position that this rulemaking is not subject to the APA, the Department previously published a related Advance Notice of Proposed Rulemaking (RIN 1400-AC78) and accepted comments for 60 days, and also published a proposed definition of

“defense service” on April 13, 2011 (RIN 1400-AC80), and accepted comments for 60 days.

Regulatory Flexibility Act

Since the Department is of the opinion that this proposed rule is exempt from the provisions of 5 U.S.C. 553, there is no requirement for an analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This proposed rulemaking does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rulemaking has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This proposed rulemaking will not have substantial direct effects on the States, on the relationship between the national government and the

States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed rulemaking does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this proposed rulemaking.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). These executive orders stress the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. These rules have been designated “significant regulatory actions,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, this proposed rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

The Department of State has reviewed this proposed rulemaking in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this proposed rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, the provisions of Executive Order 13175 do not apply to this proposed rulemaking.

Paperwork Reduction Act

Following is a listing of approved collections that will be affected by revision, pursuant to the President's Export Control Reform (ECR) initiative, of the U.S. Munitions List (USML) and the Commerce Control List. The list of collections and the description of the manner in which they will be affected pertains to revision of the USML in its entirety, not only to the category published in this rule:

1) Statement of Registration, DS-2032, OMB No. 1405-0002. The Department estimates that 1,000 of the currently-registered persons will not

need to maintain registration following full revision of the USML. This would result in a burden reduction of 1,000 hours annually.

2) Application/License for Permanent Export of Unclassified Defense

Articles and Related Unclassified Technical Data, DSP-5, OMB No. 1405-0003. The Department estimates that there will be 35,000 fewer DSP-5 submissions annually following full revision of the USML. This would result in a burden reduction of 35,000 hours annually. In addition, the DSP-5 will allow respondents to select USML Category XIX, a newly-established category, as a description of articles to be exported.

3) Application/License for Temporary Import of Unclassified Defense

Articles, DSP-61, OMB No. 1405-0013. The Department estimates that there will be 200 fewer DSP-61 submissions annually following full revision of the USML. This would result in a burden reduction of 100 hours annually. In addition, the DSP-61 will allow respondents to select USML Category XIX, a newly-established category, as a description of articles to be temporarily imported.

4) Application/License for Temporary Export of Unclassified Defense

Articles, DSP-73, OMB No. 1405-0023. The Department estimates that there will be 800 fewer DSP-73 submissions annually following full revision of the USML. This would result in a burden reduction of 800 hours

annually. In addition, the DSP-73 will allow respondents to select USML Category XIX, a newly-established category, as a description of articles to be temporarily exported.

5) Application for Amendment to License for Export or Import of Classified or Unclassified Defense Articles and Related Technical Data, DSP-6, -62, -74, -119, OMB No. 1405-0092. The Department estimates that there will be 2,000 fewer amendment submissions annually following full revision of the USML. This would result in a burden reduction of 1,000 hours annually. In addition, the amendment forms will allow respondents to select USML Category XIX, a newly-established category, as a description of articles the subject of the amendment request.

6) Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements, DSP-5, OMB No. 1405-0093. The Department estimates that there will be 1,000 fewer agreement submissions annually following full revision of the USML. This would result in a burden reduction of 2,000 hours annually. In addition, the DSP-5, the form used for the purposes of electronically submitting agreements, will allow respondents to select USML Category XIX, a newly-established category, as a description of articles to be exported.

7) Maintenance of Records by Registrants, OMB No. 1405-0111. The requirement to actively maintain records pursuant to provisions of the International Traffic in Arms Regulations (ITAR) will decline commensurate to the drop in the number of persons who will be required to register with the Department pursuant to the ITAR. As stated above, the Department estimates that 1,000 of the currently-registered persons will not need to maintain registration following full revision of the USML. This would result in a burden reduction of 20,000 hours annually. The ITAR does provide, though, for the maintenance of records for a period of five years. Therefore, persons newly relieved of the requirement to register with the Department may still be required to maintain records.

8) Export Declaration of Defense Technical Data or Services, DS-4071, OMB No. 1405-0157. The Department estimates that there will be 2,000 fewer declaration submissions annually following full revision of the USML. This would result in a burden reduction of 1,000 hours annually.

List of Subjects

22 CFR Parts 120 and 121

Arms and munitions, Classified information, Exports.

22 CFR Part 124

Arms and munitions, Exports, Technical assistance.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, parts 120, 121, and 124, are proposed to be amended as follows:

PART 120 – PURPOSE AND DEFINITIONS

1. The authority citation for part 120 continues to read as follows:

Authority: Sections 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2794; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920; Pub. L. 111–266; Section 1261, Pub. L. 112-239; E.O. 13637, 78 FR 16129.

2. Section 120.9 is revised to read as follows:

§120.9 Defense service.

(a) *A defense service* means:

(1) The furnishing of assistance (including training) using other than public domain information (*see* §120.11 of this subchapter) to a foreign person (*see* §120.16 of this subchapter), whether in the United States or abroad, in the design, development, engineering, manufacture, production, assembly, testing, intermediate- or depot-level maintenance (*see* §120.38 of this subchapter), modification, demilitarization, destruction, or processing of defense articles (*see* §120.6 of this subchapter);

(2) The furnishing of assistance to a foreign person, whether in the United States or abroad, for the integration of any item controlled on the U.S.

Munitions List (USML) (*see* §121.1 of this subchapter) or items subject to the EAR (*see* §120.42 of this subchapter) into an end item (*see* §121.8(a) of this subchapter) or component (*see* §121.8(b) of this subchapter) that is controlled as a defense article on the USML, regardless of the origin;

Note to paragraph (a)(2): “Integration” means the systems engineering design process of uniting two or more items in order to form, coordinate, or blend into a functioning or unified whole, including introduction of software to enable proper operation of the article. This includes determining where to integrate an item (*e.g.*, integration of a civil engine into a destroyer which requires changes or modifications to the destroyer in order for the civil engine to operate properly; not plug and play). “Integration” is distinct from “installation,” which means the act of putting something in its place and does not require changes or modifications to the item in which it is being installed (*e.g.*, installing a dashboard radio into a military vehicle where no changes or modifications to the vehicle are required).

(3) The furnishing of assistance (including training), to a foreign person regardless of whether technical data (*see* §120.10 of this subchapter) is transferred, including formal or informal instruction in the United States or

abroad by any means, in the tactical employment (not basic operation) of a defense article;

(4) Conducting direct combat operations for a foreign person (*see* paragraph (b)(5) of this section);

(5) The furnishing of assistance (including training) in the integration of a satellite or spacecraft to a launch vehicle, including both planning and onsite support, regardless of the jurisdiction of, the ownership of, or the origin of the satellite or spacecraft, or whether technical data is used; or

(6) The furnishing of assistance (including training) in the launch failure analysis of a satellite, spacecraft, or launch vehicle, regardless of the jurisdiction of, the ownership of, or the origin of the satellite, spacecraft, or launch vehicle, or whether technical data is used.

(b) The following is not a *defense service*:

(1) Training in organizational-level (basic-level) maintenance (*see* §120.38 of this subchapter) of a defense article lawfully approved for export from the United States or subsequently approved for reexport or retransfer to an end-user, unless otherwise proscribed in §126.1 of this subchapter or otherwise ineligible (*see* §126.7(a)(4) and (6) of this subchapter);

(2) Mere employment of a natural U.S. person by a foreign person;

- (3) Servicing of an item subject to the EAR (*see* §120.42 of this subchapter) that has been integrated or installed into a defense article;
- (4) Providing law enforcement, physical security, or personal protective services (including training and advice) to or for a foreign person (*see* §120.16 of this subchapter) using only public domain information; or
- (5) Services performed, to include direct combat operations, as a member of the regular military forces of a foreign nation by a U.S. person who has been drafted into such forces.

PART 121 – THE UNITED STATES MUNITIONS LIST

- 3. The authority citation for part 121 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920; Section 1261, Pub. L. 112-239; E.O. 13637, 78 FR 16129.

- 4. Section 121.1 is amended by revising U.S. Munitions List Category XV to read as follows:

§121.1 General. The United States Munitions List.

* * * * *

Category XV— Spacecraft Systems and Related Articles

(a) Spacecraft, including satellites, manned or unmanned space vehicles, whether designated developmental, experimental, research or scientific, or having a commercial, civil, or military end-use, that:

*(1) Are specially designed to mitigate effects (*e.g.*, scintillation) of or for detection of a nuclear detonation;

*(2) Track ground, airborne, missile, or space objects using imaging, infrared, radar, or laser systems;

*(3) Conduct signals or measurement and signatures intelligence;

(4) Provide space-based logistics, assembly or servicing of any spacecraft (*e.g.*, refueling);

*(5) Are anti-satellite or anti-spacecraft (*e.g.*, kinetic, RF, laser, charged particle);

*(6) Have space-to-ground weapons systems (*e.g.*, kinetic or directed energy);

*(7) Have any of the following electro-optical remote sensing capabilities or characteristics:

(i) Electro-optical visible and near infrared (VNIR) (*i.e.*, 400nm to 1,000nm) or infrared (*i.e.*, greater than 1,000nm to 30,000nm) with less than 40 spectral bands having an aperture greater than 0.35 meters;

- (ii) Electro-optical hyperspectral with 40 spectral bands or more in the VNIR, short-wavelength infrared (SWIR) (*i.e.*, greater than 1,000nm to 2,500nm) or any combination of the aforementioned and having a Ground Sample Distance (GSD) less than 30 meters;
- (iii) Electro-optical hyperspectral with 40 spectral bands or more in the mid-wavelength infrared (MWIR) (*i.e.*, greater than 2,500nm to 5,500nm) having a narrow spectral bandwidth of $\Delta\lambda$ less than or equal to 20nm full width at half maximum (FWHM) or having a wide spectral bandwidth with $\Delta\lambda$ greater than 20nm FWHM and a GSD less than 200 meters; or
- (iv) Electro-optical hyperspectral with 40 spectral bands or more in the long-wavelength infrared (LWIR) (*i.e.*, greater than 5,500nm to 30,000nm) having a narrow spectral bandwidth of $\Delta\lambda$ less than or equal to 50nm FWHM or having a wide spectral bandwidth with $\Delta\lambda$ greater than 50nm FWHM and a GSD less than 500 meters;

Note 1 to paragraph (a)(7): Ground Sample Distance (GSD) is measured from a spacecraft's nadir (*i.e.*, local vertical) position.

Note 2 to paragraph (a)(7): Optical remote sensing spacecraft or satellite spectral bandwidth is the smallest difference in wavelength (*i.e.*, $\Delta\lambda$) that can be distinguished at full width at half maximum (FWHM) of wavelength λ .

Note 3 to paragraph (a)(7): An optical satellite or spacecraft is not SME if non-earth pointing.

*(8) Have radar remote sensing capabilities or characteristics (*e.g.*, active electronically scanned array (AESA), synthetic aperture radar (SAR), inverse synthetic aperture radar (ISAR), ultra-wideband SAR) except those having a center frequency equal to or greater than 1 GHz but less than or equal to 10 GHz AND having a bandwidth less than 300 MHz;

(9) Provide Positioning, Navigation, and Timing (PNT);

Note to paragraph (a)(9): This paragraph does not control a satellite or spacecraft that provides only a differential correction broadcast for the purposes of positioning, navigation, or timing.

*(10) Are specially designed to be used in a constellation or formation that when operated together, in essence or effect, form a virtual satellite (*e.g.*, functioning as if one satellite) with the characteristics of other items in paragraph (a);

(11) Are man-rated sub-orbital, orbital, lunar, interplanetary or habitat; or

*(12) Are classified, contain classified software or hardware, are manufactured using classified production data, or are being developed using classified information (*e.g.*, having classified requirements, specifications, functions, or operational characteristics or include classified cryptographic

items controlled under USML Category XIII of this subchapter).

“Classified” means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization.

Note to paragraph (a): Spacecraft that are not identified in this paragraph are subject to the EAR.

(b) Ground control systems and training simulators specially designed for telemetry, tracking, and control of spacecraft in paragraph (a) of this category.

Note to paragraph (b): Parts, components, accessories, attachments, equipment, or systems that are common to satellite ground systems or simulators used to control non-USML satellites are subject to the EAR.

(c) Global Positioning System (GPS) receiving equipment specifically designed, modified, or configured for military use; or GPS receiving equipment with any of the following characteristics:

- (1) Designed for encryption or decryption (*e.g.*, Y-Code) of GPS precise positioning service (PPS) signals;
- (2) Designed for producing navigation results above 60,000 feet altitude and at 1,000 knots velocity or greater;

(3) Specifically designed or modified for use with a null steering antenna or including a null steering antenna designed to reduce or avoid jamming signals;

(4) Designed or modified for use with unmanned air vehicle systems capable of delivering at least a 500 kg “payload” to a “range” of at least 300 km.

Note 1 to paragraph (c)(4): “Payload” is the total mass that can be carried or delivered by the specified rocket, space launch vehicle, missile, drone, or unmanned aerial vehicle that is not used to maintain flight. “Range” is the maximum distance that the specified aircraft system is capable of traveling in the mode of stable flight as measured by the projection of its trajectory over the surface of the Earth. The maximum capability based on the design characteristics of the system, when fully loaded with fuel or propellant, will be taken into consideration in determining “range.” The “range” for aircraft systems will be determined independently of any external factors such as operational restrictions, limitations imposed by telemetry, data links, or other external constraints. For aircraft systems, the “range” will be determined for a one-way distance using the most fuel-efficient flight profile (e.g., cruise speed and altitude), assuming International Civil Aviation Organization (ICAO) standard atmosphere with zero wind.

Note 2 to paragraph (c)(4): GPS receivers designed or modified for use with military unmanned air vehicle systems with less capability are considered to be specifically designed, modified, or configured for military use and therefore covered under this paragraph (c)(4). Any GPS equipment not meeting this definition is subject to the jurisdiction of the Department of Commerce (DOC). Manufacturers or exporters of equipment under DOC jurisdiction are advised that the U.S. Government does not assure the availability of the GPS P-Code for civil navigation. It is the policy of the Department of Defense (DOD) that GPS receivers using P-Code without clarification as to whether or not those receivers were designed or modified to use Y-Code will be presumed to be Y-Code capable and covered under this paragraph. The DOD policy further requires that a notice be attached to all P-Code receivers presented for export. The notice must state the following: “ADVISORY NOTICE: This receiver uses the GPS P-Code signal, which, by U.S. policy, may be switched off without notice.”

(d) [Reserved]

(e) Spacecraft parts, components, accessories, attachments, equipment, or systems, as follows:

(1) Antennas as follows:

(i) Having a diameter greater than 25 meters;

- (ii) Are actively scanned;
 - (iii) Are adaptive beam forming; or
 - (iv) Are for interferometric radar;
- (2) Space-qualified optics (*i.e.*, lens or mirror), including optical coating, having active properties (*e.g.*, adaptive or deformable), or having a largest lateral dimension greater than 0.35 meters;
- (3) “Space-qualified” focal plane arrays (FPA) having a peak response in the wavelength range exceeding 900nm and readout integrated circuit (ROIC) specially designed therefor;
- (4) “Space-qualified” mechanical cryocooler, active cold finger, and associated control electronics specially designed therefor;
- (5) “Space-qualified” active vibration suppression, including isolation and dampening, and associated control electronics therefor;
- (6) Optical bench assemblies for items in paragraph(a) of this category and the multi-aperture assemblies; fast steering mirrors (*i.e.*, greater than 300 rad/sec² acceleration), pushbroom assemblies, flexure mounts, beam splitters, mirror folds, focus or channeling mechanisms, alignment mechanisms. inertial reference unit (IRU), black body cavities, baffles and covers, and control electronics specially designed therefor;

- (7) Non-communications space-qualified directed energy (*e.g.*, lasers or RF) systems and specially designed for a spacecraft in paragraph (a) of this category;
- (8) Space-based kinetic systems or charged particle energy systems, including power conditioning and beam-handling/switching, propagation, tracking, or pointing equipment, and specially designed parts and components therefor;
- (9) “Space-qualified” cesium, rubidium, hydrogen maser, or quantum (*e.g.*, based upon Al, Hg, Yb, Sr, Be Ions) atomic clocks, and specially designed parts and components therefor;
- (10) Attitude determination and control systems, and specially designed parts and components therefor, that provide earth location accuracy without using Ground Location Points better than or equal to:
- (i) 5 meters from low earth orbit (LEO);
 - (ii) 30 meters from medium earth orbit (MEO);
 - (iii) 150 meters from geosynchronous orbit (GEO); or
 - (iv) 225 meters from high earth orbit (HEO);
- (11) Space-based nuclear thermionic or non-nuclear thermionic converters or generators, and specially designed parts and components therefor;

(12) Thrusters (*e.g.*, rocket engines) that provide for orbit adjustment greater than 150 lbf (*i.e.*, 667.23 N) vacuum thrust;

(13) Control moment gyroscope;

(14) “Space-qualified” monolithic microwave integrated circuits (MMIC) that combine transmit and receive (T/R) functions on a single die as follows:

(i) Having a power amplifier with maximum saturated peak output power (in watts), P_{sat} , greater than 200 divided by the maximum operating frequency (in GHz) squared [$P_{sat} > 200 \text{ W} \cdot \text{GHz}^2 / f_{\text{GHz}}^2$]; or

(ii) Having a common path (*e.g.*, phase shifter-digital attenuator) circuit with greater than 3 bits phase shifting at operating frequencies 10 GHz or below, or greater than 4 bits phase shifting at operating frequencies above 10 GHz;

(15) “Space-qualified” oscillator for radar in paragraph (a) of this category

with phase noise less than $-120 \text{ dBc/Hz} + (20 \log_{10}(\text{RF}) \text{ (in GHz)})$ measured

at $2 \text{ KHz} \cdot \text{RF}$ (in GHz) from carrier;

(16) “Space-qualified” star tracker or star sensor with angular accuracy less than or equal to 1 arcsec in all three axes and a tracking rate equal to or

greater than 3.0 deg/sec, and specially designed parts and components therefor (MT);

*(17) Secondary or hosted payload, and specially designed parts and components therefor, that perform any of the functions described in paragraph (a) of this category;

*(18) Department of Defense-funded secondary or hosted payload, and specially designed parts and components therefor; or

(19) Spacecraft re-entry vehicles, and specially designed parts and components therefor, as follows (MT if usable in rockets, SLVs, missiles, drones, or UAVs capable of delivering a “payload” of at least 500 kg to a “range” of at least 300 km):

(i) Heat shields, and components therefore, fabricated of ceramic or ablative materials;

(ii) Heat sinks and components therefore, fabricated of light-weight, high heat capacity materials; or

(iii) Electronic equipment specially designed for spacecraft re-entry vehicles;

Note to paragraph (e)(19): For definition of “range” as it pertains to aircraft systems, *see* note to paragraph (c)(4) of this category. For definition of

“range” as it pertains to rocket systems, *see* note to paragraph (f)(6) of USML Category VI.

*(20) Any part, component, accessory, attachment, equipment, or system that (i) is classified;

(ii) Contains classified software; or

(iii) Is being developed using classified information.

"Classified" means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization.

Note 1 to paragraph (e): Parts, components, accessories, and attachments specially designed for spacecraft enumerated in this category but not listed in paragraph (e) are subject to the EAR.

Note 2 to paragraph (e): For the purposes of this paragraph, an article is “space-qualified” if it is designed, manufactured, or qualified through successful testing, for operation at altitudes greater than 100 km above the surface of the Earth. Notes: (1) A determination that a specific article (or commodity) (*e.g.*, by product serial number) is “space-qualified” by virtue of testing does not mean that other articles in the same production run or model series are “space-qualified” if not individually tested. (2) “Article” is

synonymous with “commodity,” as defined in EAR §772.1. (3) A specific article not designed or manufactured for use at altitudes greater than 100 km above the surface of the Earth is not “space-qualified” before it is successfully tested.

(f) Technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (e) of this category and classified technical data directly related to items controlled in ECCNs 9A515, 9B515, 9C515, and 9D515 and defense services using the classified technical data. (*See* §125.4 of this subchapter for exemptions.) (MT for technical data and defense services related to articles designated as such.)

(g)-(w) [Reserved]

(x) Commodities, software, and technical data subject to the EAR (*see* §120.42 of this subchapter) used in or with defense articles controlled in this category.

Note to paragraph (x): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data subject to the EAR (*see* §123.1(b) of this subchapter).

* * * * *

PART 124—AGREEMENTS, OFF-SHORE PROCUREMENT, AND OTHER DEFENSE SERVICES

5. The authority citation for part 124 is revised it to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub. L. 105–261; Pub. L. 111–266; Section 1261, Pub. L. 112-239; E.O. 13637, 78 FR 16129.

6. In § 124.1, paragraph (a) is revised to read as follows:

§124.1 Manufacturing license agreements and technical assistance agreements.

(a) *Approval.* The approval of the Directorate of Defense Trade Controls must be obtained before the defense services described in §120.9(a) of this subchapter may be furnished. In order to obtain such approval, the U.S. person must submit a proposed agreement to the Directorate of Defense Trade Controls. Such agreements are generally characterized as manufacturing license agreements, technical assistance agreements, distribution agreements, or off-shore procurement agreements, and may not enter into force without the prior written approval of the Directorate of Defense Trade Controls. Once approved, the defense services described in the agreements may generally be provided without further licensing in accordance with §§124.3 and 125.4(b)(2) of this subchapter. In exceptional

cases, the Directorate of Defense Trade Controls, upon written request, will consider approving the provision of defense services described in §120.9(a) of this subchapter by granting a license under part 125 of this subchapter.

* * * * *

7. Section 124.2 is amended by revising the section header, removing and reserving paragraphs (a) and (b), and revising paragraph (c) introductory text to read as follows:

§124.2 Exemptions for training and related technical data.

* * * * *

(c) For NATO countries, Australia, Japan, and Sweden, in addition to the basic maintenance information exemption in §125.4(b)(5) of this subchapter, no technical assistance agreement is required for maintenance training or the performance of maintenance, including the export of supporting technical data, when the following criteria can be met:

* * * * *

May 14, 2013

(Date)

Rose E. Gottemoeller,

Acting Under Secretary,

Arms Control and International Security,

Department of State.

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